Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	

REPLY COMMENTS OF GOOGLE FIBER INC.

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I. INTRODUCTION

The record on the Commission's Notice of Proposed Rulemaking[1] reflects near-consensus that the make-ready regulatory regime for pole attachments, as it occurs under the Commission's current rules, is broken and needs to be fixed. It is unnecessarily time consuming, inefficient, and costly. As long as the current regime remains unchanged, delays will continue, the deployment of new networks will be slow or abandoned, and the problems identified by the Commission will persist. There is no question that the Commission must act to improve make-ready procedures. The only question is how the Commission should achieve this goal.

Google Fiber believes that its proposed one-touch make-ready ("OTMR") procedure, modeled on the OTMR ordinance adopted by Nashville, Tennessee,[2] is the best way to resolve the problems that currently plague make-ready. OTMR relieves the burdens on pole owners and incumbent attachers that exist under the current system and transfers most of those responsibilities to new attachers, who have the strongest incentive to deploy new networks quickly. At the same time, OTMR protects existing attachers: it not only requires new attachers to pay for make-ready, as they do under the current system, but it also holds new attachers responsible for ensuring that make-ready is done safely and accurately. This carefully balanced formulation is simple and streamlined, and as such, it has received broad support from attachers, utilities, and policy groups. In moving forward to adopt OTMR, the Commission should avoid implementing complicated and unnecessary exceptions that would undermine its effectiveness. By adopting OTMR, as Nashville

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1 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266 (2017).

2 *See* NASHVILLE AND DAVIDSON COUNTY, TENN., METRO. CODE § 13.18.020; *see also* Comments of Google Fiber Inc. at 5. Unless otherwise noted, all filings cited herein were filed on June 15, 2017 in WC Docket No. 17-84.

and other cities already have, the Commission can ensure that more Americans than ever have access to robust, high-speed broadband service.

II. THE RECORD REFLECTS BROAD SUPPORT FOR OTMR AS THE BEST OPTION FOR IMPROVING MAKE-READY.

Google Fiber is not alone in urging the Commission to change the current make-ready system. Like Google Fiber, other communications providers have experienced the delays caused by slow movement from existing attachers. In addition, utilities have become frustrated managing the make-ready process. That is why OTMR has received broad support from attachers and utilities alike: it solves the problem of delay, and it significantly reduces the need for complicated coordination among multiple parties.

Numerous communications providers and associations urge the Commission to adopt OTMR.[3] These supporters include incumbent telephone companies like Verizon, competitive telecommunications providers like Level 3, distributed network providers like Extenet and Mobilitie, and competitive fiber companies like Lightower, Lumos, and Tekify. These providers recognize the uncertainty and delay caused by the current make-ready system[4] and, like Google

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[3] *See* Comments of Verizon at 4–8; Comments of Level 3 Communications at 2–3; Comments of Extenet Systems, Inc. at 54–55; Comments of Mobilitie, LLC at 8–9; Comments of Lightower Fiber Networks at 4; Comments of Lumos Networks Inc., et al., at 6; Comments of Tekify Fiber, LLC at 3 (filed June 9, 2017); Comments of the Fiber Broadband Association at 4–8; *see also* Comments of INCOMPAS at 5–10; Comments of the Computing Technology Industry Association at 2–3 ("CompTIA Comments").

[4] *See, e.g.*, Comments of Verizon at 2–3 ("Historically, we—and others—have faced delays in obtaining access to poles at reasonable cost."); Comments of Lightower Fiber Networks at i ("Lightower has experienced significant delays to deploying wired broadband infrastructure due to an inability to access utility poles . . . . Utility pole owners and pre-existing attachers regularly fail to comply with the make-ready timeframes set out by the Commission."); Comments of Mobilitie, LLC at 8 ("The current process can devolve into a drawn-out back and forth between the new attacher, the utility, and existing attachers as to who will perform the make-ready work and when, often producing series of work by different contractors, each laboriously identified and scheduled."); Comments of Liberty Cablevision of Puerto Rico

Fiber, believe that OTMR will resolve these problems, making new attachers responsible for conducting all make-ready of third-party attachments using contractors approved by pole owners.

But support for OTMR is not limited to attachers. Utility pole owners have long been burdened by a make-ready process that they are required to manage and from which they obtain little benefit. Many pole owners recognize that OTMR will not only solve the problem of delay but also relieve them of the duty to oversee a cumbersome process.[5] As a result, numerous utilities have added their support of OTMR to the record.[6] In addition, policy organizations that support faster network deployment see OTMR as the best way to both minimize disruption to communities

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LLC at 4–6 (describing numerous issues of delay in gaining access to poles); *see also, e.g.*, Comments of the Fiber Broadband Association at 4 ("In too many instances, pole owners simply ignore the Commission's mandated timelines. In effect, the pole owner 'dares' the entity seeking to attach to bring an enforcement action, knowing that it is costly to pursue a complaint and virtually impossible to have it resolved in a timely fashion."); Comments of INCOMPAS at 6 (noting that "the make-ready process is a frequent source of delay" in deploying networks and "[t]he existing rules, while adopted with the right objectives, are insufficient for modern infrastructure"); CompTIA Comments at 2 ("[OTMR] would . . . prevent incumbents from intentionally slowing down the make-ready process to stifle their competition, particularly in the case of large pole attachment orders.").

[5] *See, e.g.*, Comments of Ameren Corporation, et al., at 5 ("Electric Utilities Comments") (noting, in support of OTMR, that the Commission must place "less burden on existing attachers [and] less burden on the pole owner"); Comments of the Coalition of Concerned Utilities at 17 (noting that "[u]tilities face a host of issues trying to manage existing communications attachments" and urging the Commission to "preserve very limited electric utility resources for more important activities" by adopting OTMR); Comments of Puget Sound Energy at 2–3 (noting that the company struggles to meet current make-ready timeframes "due in part to the large increase in scope of work and to a similarly large decrease in the quality of execution on the part of attaching Communication Companies" and welcoming OTMR as a possible solution).

[6] *See* Comments of the Coalition of Concerned Utilities at 17–18; Electric Utilities Comments at 4–8; Joint Comments of Centerpoint Energy Houston Electric, LLC, et al., at 10; Comments of the Edison Electric Institute at 32–35; Joint Comments of Alliant Energy Corporation, et al., at 31–33; Joint Comments of Various Oregon Electric Utilities at 8.

caused by make-ready work—such as traffic stoppages—and allow providers to more quickly deliver faster broadband service to consumers.[7]

The support that OTMR has received from these diverse groups is evidence of what Google Fiber has consistently said: OTMR, as proposed by Google Fiber in its initial comments, appropriately balances the interests of all parties involved in the make-ready process. OTMR is not only a procedure that benefits new attachers. It benefits utilities and existing attachers, who will bear less of the burden of coordinating and completing make-ready. Additionally, it benefits consumers across the country, who will see modern broadband services delivered to their homes more efficiently than ever—and with less disruption to their daily routine.

III. THE COMMISSION SHOULD ADOPT A SIMPLE OTMR PROCEDURE AND AVOID COMPLICATED EXCEPTIONS THAT WILL MAKE IT INEFFECTIVE.

OTMR works because it is simple. As proposed by Google Fiber, OTMR consists only of a few essential regulations needed to assign responsibility for make-ready tasks, establish timeframes, and ensure the protection of existing attachments and the public. Under these clear rules, no party to the make-ready process will be left uncertain about their responsibilities or rights. Unlike a more complex regulatory scheme, OTMR will reduce the likelihood of disputes among attachers and pole owners over what the law requires, and it will not entangle the Commission in resolving these disputes.

To keep OTMR simple and effective, the Commission should reject proposed modifications to OTMR suggested in the record. Many of these proposed changes will introduce

[7] *See* Comments of Next Century Cities at 6 (filed June 12, 2017) (noting problem of delay in deploying new networks and the inconveniences to communities caused by make-ready work).

new administrative costs as well as perpetuate the ability of existing attachers to prevent or significantly delay make-ready. The less complicated OTMR is, the more effective it will be.

A. The Commission Should Reject Proposals that Give Existing Attachers Control over the Make-Ready Process for New Attachments.

Deeply entrenched communications and cable companies oppose OTMR, which reduces barriers to new competition. They argue that if the Commission nevertheless adopts OTMR, it must impose conditions on the use of OTMR to protect existing attachers. These conditions include limiting OTMR to "routine" transfers only; ensuring that OTMR will not conflict with any collective bargaining agreement ("CBA") in effect with unionized workers; giving existing attachers a voice in choosing which contractors a pole owner approves; allowing existing attachers 30 days' notice before make-ready proceeds; and requiring new attachers to indemnify existing attachers for third-party claims, such as those from customers who experience service outages.[8] Rather than improving OTMR, each of these proposals would re-introduce delays and uncertainty into an otherwise clear process and potentially give incumbents the power to veto a new attacher's use of OTMR. More importantly, none of these proposals is necessary to ensure the safe and accurate completion of make-ready or to protect existing attachers' rights.

First, the Commission should not limit OTMR to simple, or "routine," transfers. Although most make-ready involves only routine transfers, sometimes new attachers will need to perform complex make-ready—that is, make-ready reasonably expected to cause a service outage. As noted in its opening comments, Google Fiber agrees that existing attachers should have the first opportunity to perform their own complex make-ready, since service outages could affect their

[8] *See, e.g.*, Comments of AT&T Services Inc. at 14–18 ("AT&T Comments"); Comments of Charter Communications, Inc. at 54–57 ("Charter Comments"); Comments of CenturyLink at 15–16.

businesses. Even so, existing attachers should not have an exclusive and permanent right to perform complex make-ready, or they could indefinitely delay new attachers from deploying new networks. To strike the right balance, the Commission should give existing attachers 30 days to perform complex make-ready themselves. If existing attachers fail to complete complex make-ready during that time, new attachers should then be allowed to use OTMR to do so. This arrangement will ensure that existing attachers have the opportunity to control make-ready that is expected to affect their services, while reducing delays and increasing efficiency for new attachers.[9]

The Commission should also reject proposals that would only allow existing attachers to decide which transfers are routine or complex. If granted that right, existing attachers could have anti-competitive incentives to designate transfers as complex. This would undermine the efficient and equitable balance of OTMR and would perpetuate the delays and high costs that occur under the current system. Instead, the decision to classify make-ready as routine or complex should be left to the utility-approved contractor that performs the work. That contractor is a neutral third party with the expertise and experience necessary to decide when make-ready will cause a service outage. Similarly, the Commission should reject proposals to prevent new attachers from using OTMR on facilities that provide emergency services.[10] Utility-approved contractors are capable of ensuring that these services remain protected and functional during make-ready.

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[9] Similarly, the Commission should reject the proposed requirement that existing attachers have a "meaningful opportunity to perform the required make-ready work" themselves. *See* Comments of NCTA – The Internet & Television Association at 16 ("NCTA Comments"). That vague standard would lead to disputes over what a "meaningful opportunity" is and would cause delays. A fixed period of 30 days is a clear standard that allows sufficient time for existing attachers who opt to perform their own complex make-ready.

[10] *See, e.g.*, AT&T Comments at 17.

Second, the Commission should reject the proposal that any OTMR regime adopted by the Commission "should not impair the collective bargaining agreements of any existing attacher by mandating that independent contractors perform make-ready work in all situations."[11] As an initial matter, this argument rests on the faulty premise that a new attacher's use of OTMR triggers duties under existing attachers' CBAs. Under OTMR, new attachers, not existing attachers, are responsible for make-ready. Because existing attachers are not performing make-ready (or engaging a contractor to perform that make-ready), they should have no duties under their CBAs. And because OTMR is optional for new attachers, companies with such contracts will never have to violate their CBAs when they deploy their own networks; they can simply elect not to use OTMR.

Even assuming this argument has validity, the proposal to make OTMR subject to CBAs subverts the supremacy of federal law over contracts. Federal regulations do not need to adjust to private contracts; private contracts must comply with regulations.[12] Creating an OTMR regime that accommodates CBAs will complicate an otherwise simple procedure and inevitably involve the Commission and courts in unnecessary and complex disputes. Worse still, it could have the effect of prohibiting OTMR altogether in states where the procedure conflicts with a CBA.[13]

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[11] *Id.*

[12] The Commission has the authority to modify private contracts. *See W. Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (noting that the Commission has the power to "modify . . . provisions of private contracts when necessary to serve the public interest"); *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd. 5385, 5385, 5392 ¶¶ 1, 17 (2008) (applying this principle to prohibit exclusivity contracts between telecommunications providers and owners of residential premises).

[13] For example, AT&T has negotiated CBAs with unions in dozens of states. *See* 2017 AT&T Bargaining, https://www.att.com/gen/general?pid=22150 (last visited July 14, 2017) ("AT&T has reached 31 labor agreements with the CWA and IBEW since the beginning of 2015, covering about 145,000 employees."); *see also* Comments of Communications Workers of America at 6–7. If AT&T and CWA or IBEW believe their CBAs prohibit the use of

Third, the Commission should not require new attachers to indemnify existing attachers against third-party claims. This requirement would not result in a safer or more effective make-ready process. Under Google Fiber's proposed OTMR procedure, new attachers already must guarantee that make-ready work is performed accurately. Specifically, new attachers must pay reasonable expenses for existing attachers to inspect their work, and if existing attachments are damaged, new attachers must correct the problems at their own cost. Requiring new attachers to indemnify existing attachers for "outages, including attorneys' fees," will not further incentivize new attachers to better oversee the process.[14] Instead, this indemnification clause would discourage smaller attachers from deploying in large markets, where they could potentially face claims from thousands of customers for a single service outage. Existing attachers will have an incentive to invoke this indemnification right any time something goes wrong during make-ready, even if the new attacher has already paid to repair any damage and even if such third-party claims are otherwise limited by tariff or by customer agreement.[15] The Commission should avoid giving existing attachers an unnecessary and overly broad right that may be frivolously invoked in order to discourage new attachers from using OTMR.

OTMR, new attachers could be unable to use OTMR in any territory in which one of those CBAs was in effect.

[14] AT&T Comments at 18.

[15] *See, e.g.*, Southwestern Bell Telephone Company d/b/a AT&T Texas, Access Service Tariff § 2.1.3 (Jan. 4, 2012) ("[W]ith respect to any other claim or suit, by a customer or by any others, for damages associated with the installation, provision, preemption, termination, maintenance, repair or restoration of service . . . SWBT's liability, if any, shall not exceed an amount equal to the proportionate charge for the service for the period during which the service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the customer under this tariff as a credit allowance for a service interruption.").

Fourth, the Commission should not unreasonably enlarge the notice period given to existing attachers before make-ready commences. As noted by many commenters, delays often result because existing attachers are reluctant to quickly move their attachments and make room for a new competitor. Although other commenters argue that a longer notice period is needed to identify and safeguard facilities that provide emergency services,[16] a 15-day notice period should be sufficient for utility-approved contractors to ensure that these services will be adequately protected during make-ready.

Finally, the Commission should not require utilities to consult all existing attachers before approving contractors. New attachers can use OTMR only if they can hire utility-approved contractors. Giving existing attachers the power to veto contractors would effectively give them the power to prevent OTMR or, at the very least, significantly delay its implementation. Moreover, this requirement is unnecessary. Utilities already have a strong interest in protecting their poles and the attachments on them, and they are more than qualified to approve contractors to perform make-ready.[17] Forcing utilities to consult with existing attachers will only lead to drawn-out and costly disputes that will make OTMR more bureaucratic and less efficient.

Google Fiber understands the need to ensure that existing attachments are protected and essential services are not disrupted, and Google Fiber's simple proposed OTMR procedure will achieve these goals. Complicating the procedure will do nothing to further these objectives. Instead, it will result in the same costly delays experienced under the current regime and involve the Commission in new disputes.

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[16] AT&T Comments at 17.

[17] Google Fiber's experience has been that the contractors approved by pole owners tend to be the same contractors used by both new and incumbent attachers—a fact that would make this requirement even more unnecessary.

B. Alternatives to OTMR Will Not Effectively Lower Costs or Speed Deployment.

While most commenters acknowledge that OTMR is the best solution for improving make-ready, some commenters have proposed different methods for improving make-ready. But these alternative proposals will not resolve the problems that all stakeholders recognize exist.

For example, the American Cable Association ("ACA") suggests a 90-day timeframe for processing make-ready for attachment orders of 20 or fewer, after which an attacher can invoke a "one-touch" self-help remedy to complete any work that has not been performed.[18] This proposal will not significantly reduce delay for three reasons. First, as Google Fiber has noted, reduced timeframes alone will not lead to faster make-ready. Part of the problem with the current make-ready system is that it is administratively complicated. Many parties, often competitors, must coordinate with each other in order to accommodate a new attachment. Under this system, make-ready must be performed sequentially, and one existing attacher often cannot move its attachments until another attacher moves its own to clear the necessary space. Because of this inefficient system, parties already have difficulty meeting the longer timeframes in the current rules. Making these timeframes shorter will not eliminate delay.

Second, as long as existing attachers control the make-ready process, make-ready will rarely be completed faster than the maximum timeframe. Therefore, under a proposal like ACA's, existing attachers will most likely complete make-ready no earlier than the 90 day maximum—and they will suffer no consequences for not completing make-ready sooner, even if it would have been easy to do so.[19]

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[18] Comments of ACA at 45–46.

[19] For the same reasons, other commenters' proposals for shorter timeframes without a change in the make-ready process will be ineffective.

Third, ACA's "self-help one-touch make-ready" is actually no modification of the existing rules at all. The current rules provide for a self-help remedy, but even ACA recognizes that it is little used—and nothing in ACA's proposal addresses what it identifies as the core issue: that "few utilities are allowing attachers to exercise their self-help rights."[20]

Like ACA's proposal, other proposals to improve make-ready will also be ineffective. For example, AT&T proposes that new attachers should be willing to pay more for faster make-ready.[21] Not only would this proposal aggrandize the market power of incumbents, it would also do nothing to force existing attachers to meet their deadlines. AT&T's suggestion only adds to the power of existing attachers by allowing them to hold new attachers for ransom. This proposal would make it more costly to deploy networks and, in doing so, discourage providers from expanding into new markets.

The plain fact is that allowing incumbents to move their own facilities will never be the most efficient way of completing make-ready—especially when those incumbents have no incentive to help competitors deploy their networks. As demand for high-speed, robust broadband grows and more new providers seek to enter the market, the process and timing for make-ready must change to facilitate competition. Unlike alternative proposals from other commenters, OTMR does that in a way that treats all parties fairly.

C. Allowing Utility-Approved Contractors to Perform Make-Ready Will Not Increase the Risk of Damage to Existing Attachments.

OTMR contains numerous protections that ensure that make-ready is performed safely and that existing attachments are not damaged, including requiring that all work be performed by approved contractors, mandating that new attachers pay reasonable expenses for existing attachers

[20] Comments of ACA at 44.

[21] AT&T Comments at 28.

to inspect completed make-ready work, and imposing financial liability on new attachers for damage caused to facilities. Nonetheless, some commenters, including Comcast and Charter Communications, insist that make-ready can be performed safely only if existing attachers have an opportunity to do it themselves.[22] But there is no evidence supporting the view that existing attachers can better perform make-ready than contractors that have been vetted and approved by utilities—and, indeed, these commenters cite none.[23] Rather than providing evidence that utility-approved contractors cannot perform make-ready effectively, these commenters instead describe instances of alleged damage to their facilities caused by work performed by third parties.[24]

Google Fiber takes these claims seriously, as it does any time another provider informs it of a potential issue with make-ready. But these allegations do not support Comcast and Charter's arguments against OTMR because none of these alleged violations occurred under an OTMR regime. In contrast to ad hoc arrangements like those that Comcast and Charter claim resulted in damage to their facilities, each element of OTMR works together to increase oversight and accountability. In turn, OTMR increases efficiency and reduces administrative burdens. OTMR

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[22] *See* Comments of Comcast Corporation at 21; Charter Comments at 39; NCTA Comments at 16.

[23] Moreover, as noted above, the contractors that existing attachers engage to perform make-ready work on their attachments are often the same contractors approved by the pole owners.

[24] For example, in support of its argument, Comcast cites an allegation that 40 percent of Google Fiber's make-ready work on Comcast equipment in Nashville violated industry standards. Comments of Comcast Corporation at 21–22. In fact, though, Google Fiber performed this work before Nashville adopted its OTMR ordinance, and the work was done under agreed contractual arrangements only after Comcast failed to meet its deadline under the pole owner's rules. Moreover, Comcast inspected the work before it was completed, and upon receiving notice of the violations, Google Fiber made corrections as required. And though Charter provided photographs of allegedly inadequate work performed by Google Fiber in Kansas City, Charter provided no other details of the work, such as the pole locations or the date the pictures were taken. Charter Comments at 42–44. As such, Google Fiber cannot verify any of Charter's claims.

does not increase the risk of damage to existing attachments—in fact, it goes further than the current regime in protecting these facilities and their owners by requiring that the work be performed by a utility-approved contractor, ensuring that all existing attachers receive electronic notification of the work, giving all existing attachers the right and opportunity to inspect the work at the new attachers' expense, and mandating that the new attacher promptly correct any problems.

Comcast's and Charter's claims do not highlight a problem with OTMR. Rather, they indicate a general unwillingness to let a third party perform make-ready on their facilities—a position that, given the current state of delay, is unworkable.

IV. CONCLUSION

OTMR is widely supported by attachers, utilities, and public policy groups because it strikes an appropriate balance among all parties. As proposed in Google Fiber's initial comments, OTMR supports fast deployment of new networks by allowing new attachers to coordinate all make-ready; it protects existing attachments by requiring approved contractors to perform the work and by making new attachers liable for issues caused during make-ready; and it creates a simple procedure that makes the rights and duties of new attachers, existing attachers, and utilities clear to everyone involved. No other proposed solution achieves all of these goals. Google Fiber urges the Commission to adopt an OTMR procedure that simplifies and optimizes the make-ready process and spurs the expansion of new networks across the country.

Respectfully submitted,

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